



PARTNERSHIPS IN TRANSIT

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Legislative Perspective

Karen Hedlund



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Drafting for the New Paradigm

- Legislative Precedents
- Additional Procurement Issues
- “Availability Payment” Schemes
- Federal Laws and Regulations

PPPs: Key Public Sector Objectives

- Effective Competitive Procurement Methods
- Maximize Private Sector Investment and Risk Sharing
- Limit Public Financial Exposure
- Reasonable User Fee Structure and Profits
- Opportunity for Revenue Sharing
- Quality Design, Construction, Operation and Maintenance
- Effective Assurances of Performance
- Effective Remedies

Where to Look for Legislative Precedent (if needed)

- Project-specific statutes (LAX/Palmdale)
- Agency-specific statutes
 - Louisiana Transportation Authority
 - Los Angeles Metro
 - Maryland Transportation Authority
- Statutes applicable to multiple agencies (CA, DE, NV, VA, WA)
- ABA Model Code (ABA, HI, MD)
- Nossaman Model Statute – Arizona HB 2396
- Non-profit approach (MI)

Authority to Contract

Agency may have ability to proceed without need for new legislation

- New Jersey Transit
- Portland Airport MAX
- JFK Airtrain



Authority to Contract

- Ability to bundle:
 - Design
 - Construction
 - Operations
 - Maintenance
 - Finance
- Authority to enter into multi-year contracts
- Authority to enter into leases
- Limitations on “contracting out”

Additional Procurement Issues

- Is prequalification/short-listing allowed?
(not contemplated by Model Procurement Code)
- Are pre-proposal one-on-one meetings allowed?
- Are pre-award negotiations allowed? (not under Model Procurement Code)
- Requirement to list subcontractors in bid?

Additional Procurement Issues

- Are required evaluation criteria consistent with desired approach?
- Can charge evaluation fees?
- Hire financial, legal consultants?
- Alternative dispute resolution?

Other Issues to Consider in Drafting Legislation

- Restrictions on use of right of way – *Anti-Kelo* Laws
- Transit-oriented development (legislative provisions that allow/encourage/discourage)
- Investment by foreign entities
- Application of regulated utility laws



Availability Payment Schemes

- Precedent FDOT-595; Miami Port Tunnel
- Payment for performance over long term
- Agency controls fairbox
- Strong credit if agency credit is high
- *Does payment obligation constitute long-term debt subject to legal constraints?*

“Non-Compete”

- May provide compensation for lost revenues due to construction of competing facilities
- ***But cannot bar public entity's right to build any facility regardless of location***

Federal Statutory and Regulatory Issues

- FTA policies provide flexibility
 - lessons learned from turnkey demo program
 - competitive proposals and “best value” selection permitted
- “Penta P” pilot program under SAFETEA-LU
 - risk sharing
 - streamlined project development

***Penta P* and Environmental Process**

- General Rule: until ROD is issued
 - no RFP
 - no ROW acquisition
 - no final design
- *Penta P* exceptions
 - can issue procurement docs so long as no alternative is precluded
 - preliminary engineering is permitted, not “final design”
 - role of consultants in NEPA process defined
 - accelerated review process

Contacts

Karen J. Hedlund

khedlund@nossaman.com

Kathryn Pett

kpett@nossaman.com

Nancy C. Smith

nsmith@nossaman.com

www.nossaman.com/infrastructure